BEFORE THE UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD

STANDARD PARKING, IMPERIAL PARKING, AMPCO SYSTEM PARKING d/b/a ABM PARKING SERVICES LAZ PARKING, INTERPARK, Individually and on behalf of CHICAGO PARKING ASSOCIATION

And,

TEAMSTERS LOCAL NO. 727

Case No. 13-CA-71259

CHARGING PARTY TEAMSTERS LOCAL UNION NO. 727 ANSWER IN OPPOSITION TO RESPONDENTS' CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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INTRODUCTION

Respondents' Cross-Exceptions to the Administrative Law Judge's findings of fact in the instant case seek to muddy the Record of a relatively simple set of facts and create factual disputes over immaterial issues. Respondents' Cross-Exceptions to the Administrative Law Judge's conclusions of law in the instant matter are either, likewise, irrelevant to the core issues presented in this case or are contrary to well-settled law. In many instances, Respondents lift black letter law without any attention to the actual facts of the case law or application of those facts and specific holdings to the instant case. The Charging Party's Response in Opposition to the Respondents' Cross-Exceptions seeks to demystify alleged factual controversies as actual immaterial disputes and to provide a more accurate and attentive application of case law that explores the nuance of cases relied upon by Respondents and Charging Party and their relevance hereto.¹ The result clearly demonstrates that Respondents' Cross-Exceptions should be denied in their entirety and the Union's and Counsel for the General Counsel's Exceptions sustained and requested remedies duly ordered.

STATEMENT OF FACTS

The Charging Party Teamsters Local Union No. 727 (hereinafter "Charging Party" or "Union") adopts the ALJ's Findings of Facts issued on October 25, 2013 and adopts and incorporates them hereto with the exception of Charging Party Exceptions 1-5 filed on or about November 22, 2013. In conjunction with the ALJ's findings of facts, the Charging Party further submits the following additional brief statement

¹ References to the ALJ's Decision and Order are designated as "ALJD"; references to the Respondents' Cross-Exceptions to the Decision of the ALJ and Brief In Support Thereof are designated as "RCE"; references to the official transcript are designated as "Tr."; references to the exhibits of the Counsel for the General Counsel are designated as "GC Ex.," and exhibits of the Respondents as "R.Ex."

of facts in support of its Opposition To Respondents' Cross-Exceptions To the Decision of the Administrative Law Judge:²

I. OCTOBER 28, 2011 AGREEMENT

A. Chicago Parking Association's 30 Year Bargaining History With Teamsters Local Union No. 727

The Secretary-Treasurer and principal officer of Teamsters Local Union No. 727, John T. Coli Sr., participated in collective bargaining with the Chicago Parking Association (hereinafter "CPA") since at least 1981. Tr. 46. As Union lead negotiator for a majority of the contracts, including the 1996, 2001, and 2006 contracts governing the Chicago Parking Industry, Mr. Coli Sr. witnessed the CPA negotiate all of the prior contracts on behalf of the entire parking industry. Tr. 48; GC Ex. 5-7. During this time, the Respondents always had representatives at the table and never once argued they were not bound by the CPA negotiated contract.³ Tr. 50; 55-56; 60. In fact, all of the Respondents (with the exception of ABM who was then known as System Parking) all signed the CPA-negotiated prior contracts including the most recent 2006 contract. Tr. 466, 786.

B. The Two-Tier Wage System

Over the course of the 30 year bargaining history with the CPA, a two-tier wage system developed in 1996. GC Ex. 5 at p.5, GC Ex. 6 at p.5, GC Ex. 7 at p. 6-7; Tr. 56-58; 60. The historical two-tier wage system as agreed upon for 2011 is included, *inter alia*, in General Counsel Exhibit 27(b) at pp. 6-8. The first wage tier always historically consisted of employees hired prior to the effective date of the relevant collective bargaining agreement (CBA) (all of the agreements began on November 1 of the expiring contract year), and the second tier always historically consisted of employees hired on or after the effective date of the CBA. Tr. 321. The effective date of the contract has always historically been used as a cut-off date for

² Charging Party also adopts and incorporates hereto its post-hearing brief submitted to the ALJ on August 30, 2013, as well as its Exceptions to the Decision and Recommended Order of the ALJ and Brief in Support of Its Exceptions filed with the National Labor Relations Board on or about November 22, 2013.

³ LAZ parking did not exist in the Chicago Parking Industry market until 2001, at which point it was present as a member of the CPA bargaining committee for negotiations. Tr. 49.

determining into which wage tier an employee falls, with those employees hired prior to the effective contract date being paid at a higher rate than those hired on or after the effective date of the contract. The tiers and progression of wages within each tier recognizes career longevity in the industry and loyalty to the employer. This longstanding wage system is the same wage system which the Respondents are now disputing. In fact, the only change in the tiered system from 1996 to present is an added group of employees (Residential employees) that were incorporated jointly into the 2006 agreement. GC Ex. 7 at p. 5-7. The effective date of the contract is the only cutoff date that has ever been used by the CPA or the Union in over 30 years of bargaining with the CPA, including but not limited to the Respondents. Tr. 60. The only items that changed in each tier are the actual dollar amounts which were negotiated and agreed upon each contract year expiration. Tr. 72. As recognized by Respondents, "the scales . . . changed from contract to contract." RCE at p. 21.

C. The 2011 Negotiations With The CPA

Prior to the expiration of the 2006-2011 contract (October 31, 2011), the Union sent letters reopening the contract for negotiations to all of the parking industry employers (including Respondents) on August 3, 2011. ALJD at p. 5; GC Ex. 2A-E. In the re-opener, the Union explicitly stated that it intended on negotiating with the CPA for the successor agreement applicable to the entire parking industry and provided specific directions for employers who wished to "opt out" of this bargaining arrangement. Id.; Tr. 463. At no point prior to, or during bargaining, did any of the Respondents express an intent to "opt out" of having the CPA bargain on their behalf. Tr. 101, 467-468. Additionally, none of the Respondents ever communicated any intent to not be bound by the CPA-negotiated contract. Tr. 102, 690. In 2011, the Respondents also paid "dues" to the CPA for the purpose of collective bargaining. Tr. 722.

Similar to the 2006 negotiations, Fred Schwartz (counsel for the CPA, hereinafter "Schwartz") was retained by the CPA to act as the chief spokesperson and bargaining representative for the entire CPA (and Respondents). Tr. 462. The ALJD found, and the Charging Party does not dispute, that for all intents and

⁴ Prior to 2006, Residential location (i.e. condominiums, apartment buildings) were covered under a separate, yet identical collective bargaining agreement. Tr. 59

purposes, "Schwartz had (at a minimum) apparent authority to speak on the Association's and the Respondents' behalf for the 2011 negotiations with the Union about a successor collective-bargaining agreement . . . [and] that Schwartz had the authority to bind Respondents to a new contract." ALJD at pp. 23-24.

D. September 27, 2011 Meeting Where Union Proposes Historical Two-Tier Wage System

Negotiations between the Union and the CPA for the 2011 contract began on September 27, 2011 with John Coli Jr. (lead negotiator and chief spokesperson), John Coli Sr. (Secretary-Treasurer), and Stephanie Brinson (General Counsel and note-taker) for the Union, and Fred Schwarz (attorney and chief spokesperson for the CPA and all Respondents), Jim Buczek (Standard Parking), Eric Uhlig (Imperial Parking), Tony DiPaolo (LAZ Parking), John Daniels (ABM), and Mike Prussian (Interpark) for the Respondents. ALJD at p. 6; Tr. 110-113. No ground rules, including but not limited to ratification as a condition precedent to the parties reaching an agreement, were made during the outset or anytime during negotiations. ALJD at pp. 5-6 fn. 9; Tr. 111, 298, 623, 625.

Negotiations began with the Union distributing copies of its first proposal in redline to all of the members of the CPA bargaining committee. Tr. 113, 299; GC Ex. 11. John Coli Jr. then went through the entire proposal, article-by-article, noting the changes and providing explanations for the changes that appeared in redline. Tr. 114, 300. The Union proposed the historical two-tier wage scales affecting Residential and Commercial employees "Hired prior to" and "Hired on or after November 1, 2011." GC Ex. 11. The Union also proposed \$1.00 across the board annual increases (a change from the \$.55 cents in the prior contract). Tr. 115, 300-303; GC Ex. 11.

For better readability, the Union kept the wage charts themselves in non-redline format, but signaled the wage scale changes both verbally and clearly in writing for the Respondents in red with asterisks on the proposal itself which reads, "the following charts are not in redlined format." Tr. 115, 281.

⁵ The Union used the expiring 2006 collective bargaining agreement as the blueprint for its proposals and noted all the changes it was seeking for the 2011 contract in redline. GC Ex. 11.

As testified to by multiple Union witnesses, redline formatting within the parameters of the wage charts would cause misalignment of the wage progressions with strings of numbers (some struck through and some not), making it harder to see the actual proposed progressions and corresponding wage amounts. Tr. 115, 281. During his presentation of the Union's proposal, John Coli Jr. specifically addressed the formatting difference verbally at the bargaining table by noting that "the wages are not in redline but the wages themself are changed." Tr. 281. As was the case in prior years, the effective date in each tier was changed to mirror the start date of the contract (November 1, 2011). Tr. 119; GC Ex. 7; GC Ex. 11. As testified to by all of the Respondents, the wage cutoff date (November 1, 2011) appeared in all capital bold lettering approximately eight times throughout the proposal. Tr. 117, 303. None of the Respondents refuted seeing the November 1, 2011 cutoff date in the Union's proposal during trial. Id. These bold, upper-case words speak for themselves, and it is abundantly clear from the date of November 1, 2011, that anyone hired during the term of the prior contract (i.e., hired after 2006 and, therefore by definition, "prior to November 1, 2011") would no longer be in the second wage tier of the new contract, but would necessarily move to the first wage tier of the new contract under the Union's proposal.

After John Coli Jr.'s explanation of the Union's proposal, Schwartz distributed copies of the collective CPA offered proposal. Tr. 120; GC Ex. 12. The CPA proposed no changes to the two-tiered wage system. <u>Id.</u> The CPA proposal document itself did on its face state "3rd Tier: Eliminate progression," but this was never explained by Schwartz or mentioned as a change to the two-tiered wage system during bargaining other than eliminating the commercial/ residential differential.⁶ <u>Id.</u>; Tr. 560. In fact, no one from the CPA bargaining committee, including Schwartz, mentioned anything about a desire to change to the two-tiered wage system that had been used in prior contracts. Tr. 126, 305.

⁶ During both Direct and Cross-examination, Tony DiPaolo testified that he did not know what this "third tier" language referenced. Tr. 485, 510. However, later Eric Uhlig only testified that this was intended to signal an elimination in the progression for employees hired after November 1, 2011. Tr. 535. That intention was never communicated to the Union.

E. Second And Third In-Person Bargaining Sessions

The parties met again on October 7, 2011 and for a third time on October 12, 2011. ALJD at pp. 8-9. On behalf of the CPA, Schwartz verbally proposed a collective counter-offer on behalf of all Respondents of a one-year wage freeze and removal of the six-month raise. Tr. 133. The CPA proposed no changes or counter-offers to the Union's offer to maintain the two-tier wage system as proposed by the Union during this session. Id. By the end of the October 12, 2011 meeting, the Union verbally agreed to the removal of the six-month increase as long as the first year increases remained the same. Id. at 134. Bargaining did not conclude on October 12, 2011, and Schwartz on behalf of the CPA requested time to caucus and send a collective counter offer to the Union via email. Id.

F. Continued Bargaining Via Electronic Mail With The CPA

On October 13, 2011 at 5:36 p.m., Schwartz emailed John Coli Jr. purporting to submit the collective CPA "final offer." Tr. 135; GC Ex. 13A-B. All of the Respondents were copied on the email. Id. In regards to economics, the CPA proposed \$.55 cent increases "with scales proportionate to the prior agreement, eliminate the six-month increase." GC Ex. 13B (See Addendum A, attached to Union's Exceptions to the ALJD demonstrating offer-acceptances). The CPA proposed no changes to the two-tier wage system in its final offer, and there was no reference to the mysterious "3rd tier" from the CPA's initial proposal. GC. Ex. 13B; Tr. 136, 319.

That same day, John Coli Jr. responded with a counter-offer and asked for clarifications on some of the additional tentative agreements reached by the parties and stated that "I believe we have a Tentative Agreement that we can begin to finalize." Tr. 137; GC Ex. 14 (emphasis added); See Addendum A, attached to Union's Exceptions to the ALJD. On October 14, 2011 at 10:33 a.m., Schwartz responded to John Coli Jr.'s email that "we [the CPA] are in accord" and accepted the tentative agreement counter-offer and points of clarification. Tr. 138; GC Ex. 15; See Addendum A, attached to Union's Exceptions to the ALJD. Schwartz then forward his response to the Respondents. Id. None of the Respondents responded to Schwartz or John Coli Jr.'s emails proposing a change to the two-tier wage system. Id.

Contrary to the conclusions of law issued by the ALJ, contract negotiations did not cease on October 13-14, 2011. ALJD at pp. 24-27. In fact, the Record evidence is clear that a number of offers, counter-offers, modifications, and/or acceptances occurred between October 18, 2011 and October 28, 2011; See Addendum A, attached to Union's Exceptions to the ALJD. On October 18, 2011, the Union's General Counsel, Stephanie Brinson, incorporated the tentatively-agreed upon changes and sent the proposed final document to Schwartz as an offer for review. Tr. 140, 320; GC Ex. 16A-B; See Addendum A, attached to Union's Exceptions to the ALJD. The document sent included the agreed upon November 1, 2011 cutoff date (which had been a Union proposal since September 27, 2011) as well as the two-tier wage system as proposed and agreed to by the CPA and the Union. Id. The actual cutoff date of November 1, 2011 clearly appears approximately eight times in all capital boldface letters throughout the October 18, 2011 document. Tr. 141, 320; GC Ex. 16B; See Addendum A, attached to Union's Exceptions to the ALJD. Most significantly, all of the wage amounts were included in the October 18, 2011, document in black and white and sent to Schwartz and the Respondents on October 18, 2011 for their review. Id.

The Respondents and Schwartz provided no response articulating a change to the included two-tier wage system or any of the wage amounts. <u>Id.</u> Having received no response from Schwartz, on October 21, 2011, Ms. Brinson again sent the same document, again including in the same contract draft the same wage scales and tiers with the same numbers and cutoff date in all capital boldface letters as an offer for review. Tr. 143; GC Ex. 17A-B at p. 7-8; See Addendum A, attached to Union's Exceptions to the ALJD. Since it was a final draft, Ms. Brinson did not originally send the document in Word formatting. However, upon request from Schwartz, the redline Word version was sent on October 25, 2011 after Ms. Brinson received

⁷ The Respondents are apparently in agreement on the wage scale of those hired on or after November 1, 2011. GC Ex. 27(b) pp. 7 and 8. To maintain the \$2.00 differential between tiers as in the 2006-2011 CBA, the last year wage of 5 year employees in the "hired after" tier must be two dollars less than the last year wage of 5 year employees in the "prior to tier." The Union's CBA maintains that \$2.00; the Employer's creates an entirely new tier.

⁸ It should be strongly emphasized that a redlined Word Document that can be edited and changed is highly confidential proprietary information belonging solely to an attorney's client which could reveal, at a minimum, bargaining strategy and other metadata. Any attorney, including Ms. Brinson, should seek consent before distributing a Word document to any outside party even if the "demand" is repeatedly made, which is what Ms. Brinson did. Neither Schwartz no the CPA is Ms. Brinson's client.

consent and direction from her client to send the Word document. GC Ex. 18-A-B, 20A-B, 35. As previously articulated during the first bargaining session on September 27, 2011, the wages were not in redline due to readability and formatting complications that would have occurred and made proposals confusing. Ms. Brinson, as a professional reminder, pointed this out again to Schwartz in the email stating, "I did not include wage scales. The wage scales are in the prior versions I have sent you." Id.; Tr. 148. The prior version did, in fact, include the two-tier wage system with wage rates and the November 1, 2011 cut-off date. GC Exs. 16A-B, 17A-B at p. 7-8. The actual charts in the redlined version did, however, maintain the November 1, 2011 cutoff date in all capital boldface letters. GC Ex. 18 A-B; 20 A-B, 35.

On October 28, 2011, at 11:09 a.m., after reviewing the document offered by the Union, Schwartz, on behalf of the CPA, emailed the Union, copying all of the Respondents, articulating a counter-offer and additional proposed changes. Tr. 150; GC Ex. 21; See Addendum A, attached to Union's Exceptions to the ALJD. As noted by the ALJ in his findings of facts "Schwartz requested" changes from the Union and "noted that the Employers' bargaining committee expected to complete its review . . . 'today' and that he would forward any additional comments to the Union." ALJD at p. 12 (emphasis added). Respondents have not filed exceptions to these findings of fact, and they should, therefore, be accepted. Schwartz, in reviewing the final draft, noted a difference in Article 20.4 where the Union had rounded up, and Schwartz, after consulting with the Respondents, countered with the calculation of five cents to be rounded down. Id.; Tr. 150, 328-329,773. Scwhartz also made additional proposed changes to Section 13.1 (funeral leave), Section 14.3 (vacations), and Section 40.5 (drug/alcohol/background checks). Id. At no point during these communications did the Respondents or Schwartz ask for any changes to the wage provisions as drafted and repeatedly provided to the CPA in the document sent to Schwartz on October 18 and 21, 2011. Tr. 151, 329; GC Ex. 21.

The Union promptly countered Schwartz's counter-offers and clarifications at 11:54 a.m. with its own counter-offer. Tr. 152, 329-330; GC Ex. 21; See Addendum A, attached to Union's Exceptions to the ALJD. The ALJ properly characterized the response in the following manner: "Coli Jr. informed Schwartz that the Union <u>agreed</u> to all of the Association's requested changes <u>except</u> for the <u>proposed changes</u> to

Sections 14.2 and 40.5 . . . Coli Jr. added that he would ask Brinson to make the <u>changes</u> that the Union <u>agreed to . . ."</u> ALJD at p. 12 (emphasis added); GC Ex. 21. In response to the Union's counteroffer, Schwartz at 12:03 p.m. on October 28, 2011 notified the Union that the CPA "<u>accepted</u> the Union's position on Section 14.2," and at 12:05 p.m., the Union sent a counter-offer "incorporating the <u>agreed changes</u>" with the remaining open issue of Section 40.5 still open and being negotiated. (ALJD at p. 12)(emphasis added); GC Exs. 22; 23A-B; See Addendum A, attached to Union's Exceptions to the ALJD. Respondents have not filed exceptions to these findings of fact, and they should, therefore, be accepted.

By the noon hour on October 28, 2011, the CPA was still bargaining remaining items on the table both with the Union and internally with the Respondents. ALJD at p. 12. In an e-mail time stamped 12:57 p.m. attaching a revised contract, Schwartz presented a counteroffer to the Union in which he "made one revision . . . [slubject to that as well as subject to the appropriate wage progression schedules to be inserted per your earlier email, we are in accord . . ." ALJD at p. 12 (emphasis added); GC Ex. 25; see Addendum A, attached to Union's Exceptions to the ALJD. Respondents have not filed exceptions to these findings of fact, and they should, therefore, be accepted. Prior e-mails sent by the Union to Schwartz repeatedly included said wage progression schedules. (GC Ex. 16, 17).9 As a counteroffer for the Union, Ms. Brinson incorporated the changes demanded by the CPA into the agreement and resent the final draft to Schwartz, including the two-tier wages. Tr. 161, 336-337, 767-770. GC Ex. 26A-B; See Addendum A, attached to Union's Exceptions to the ALJD. Included in that counteroffer sent to Schwartz at 1:38 p.m. on October 28, 2011, were "wage scales . . . another change to Section 40.5" and a statement from the Union that "all other changes . . . have been agreed upon . . ." ALJD at pp. 12-13 (emphasis added). Respondents have not filed exceptions to these findings of fact, and they should, therefore, be accepted.

Upon receipt of the Union's 1:38 p.m. counteroffer, Schwartz at 1:40 p.m on October 28 accepted the counteroffer on behalf of the CPA by stating, "we [i.e. the CPA] are <u>fine</u> with the <u>change(s)</u>," at which

⁹ It should be noted that the Respondents dropped any proposal to "eliminate wage progressions" as implied in its opening "3rd tier" September 27, 2011 proposal.

point Ms. Brinson sent the final agreement to Schwartz in both Word and PDF as a courtesy that again, for the third time since October 18, 2011, included all actual wages, tiers, and progressions. ALJD at p. 13 (emphasis added); GC Ex. 27A-B. In the final written agreement document, all of the wage rates and provisions remained the same as the October 18 and 21, 2011 emailed document, the applicable amounts were included, the two-tier systems were maintained, and the cutoff date of November 1, 2011 were included. Id. The attached agreement and email articulating that the CPA was "in accord" was also sent by Schwartz to Respondent representatives Jim Buczek and Mike Prussian. ALJD at p. 11, fn 22.¹⁰

II. THE RESPONDENTS' REFUSAL TO EXECUTE THE AGREED UPON CONTRACT

In an abundance of caution, the Union waited to mail the parties' contract for member ratification until it was objectively clear in writing what the actual written terms of the parties' agreement were. As recognized by the ALJ, "[s]hortly after concluding the October 28" bargaining "with Schwartz about the contract, the Union began preparing documents to send to its member to begin the contract ratification process." ALJD at p. 13. Respondents have not filed exceptions to these findings of fact, and they should, therefore, be accepted.

On November 2, 2011 at 11:17 a.m., subsequent to the beginning of ratification process and the express written agreement to the terms of the contract between the parties, Schwartz emailed the Union attempting to rescind the CPA's agreement. ALJD at pp. 13-15. Tr. 169, 340-341; GC Ex. 29; see Addendum A, attached to Union's Exceptions to the ALJD. For the first time since bargaining began, Schwartz claimed that there should be a never before proposed "third tier" for employers hired between November 1, 2006 and November 1, 2011. Id. The date, November 1, 2006 never appeared in any drafts or proposals exchanged between the parties, and no one from the CPA or Schwartz himself articulated the desire to have a November 1, 2006 tier. ALJD at p. 14; Id., Tr. 780. The Union promptly responded to

¹⁰ It should be noted that even if the Counsel for the General Counsel argues that the "agreement" reached was at 12:57, this does not affect the Union's position or argument of 1:40 being the operative time. The 12:57 p.m. email clearly articulates Agreement from the CPA, which was again memorialized at 1:40 p.m. GC 27(a).

Respondents' attempted rescission explaining that the agreement was final on October 28, 2011. ALJD at pp. 14-15; Tr. 172; GC Ex. 30.

On November 3, 2011, Schwartz then called Mr. John Coli Jr. explaining that the CPA (and Respondents) suddenly had a problem with the wage scales. Tr. 173. John Coli Jr. again explained that an agreement had already been reached, but consented to meet with Schwartz and the Respondents to hear their concerns on November 4, 2011. ALJD at p. 15. At the November 4, 2011, meeting, Ms. Brinson presented all of the emails and drafts of the agreement to the Respondents. <u>Id.</u> One Respondent representative, Mike Prussian, then blamed and "degrade[ed]" Schwartz for his mistake. Tr. 175,738. "Prussian faulted Schwartz for letting the Union do the drafting" and called him "lazy" for not reading the agreement before "agree[ing]" to it. ALJD at p. 15; TR 175, 738, 739. Prussian also indicated that Schwartz would no longer be the representative for the CPA after the meeting. <u>Id.</u>, Tr. 341, 738. The CPA fired Schwartz shortly thereafter. Tr. 739.

Approximately four days later on November 8, 2011, Prussian hand-delivered a letter to Mr. John Coli Sr. with a new wage scale that Respondents created from whole cloth in an effort to replace the agreed upon contract. Tr. 178; GC Ex. 31A-B. Through this letter, the "Respondents . . . [and/or] the Association formally rejected the wage scales that were included in the October 28 draft contract and offered instead to grant employees annual raises . . ." ALJD at p. 15 (emphasis added). Respondents have not filed exceptions to these findings of fact, and they should, therefore, be accepted. In the letter, the Respondents desperately attempted to "withdraw their offers . . . [and] revoke their acceptances of Local 727's [October 28] proposal." ALJD at pp. 15-16 (emphasis added). As also testified by Tony DiaPalo (Regional Vice President for LAZ Parking), this letter was the Respondents' attempt to "rescind the agreement." Tr. 504, 518, 548.

Sometime after the parties' October 28, 2011 agreement was ratified by the membership on November 15, 2011, Respondents replaced Schwartz with Douglas Darch. ALJD at p. 17. Respondents have not filed exceptions to these findings of fact, and they should, therefore, be accepted. On November 17, 2011, Darch contacted the Union via telephone and "confirm[ed] the parties' agreement to implement

the October 28 agreement except for the wage scales." ALJD at p. 17 (emphasis added). On November 21, 2011, the Union sent the full October 28, 2011 agreement with the wage scales to all Respondents (and all other members of the CPA) for execution. ALJD at p. 17.

Almost an entire month later on December 13, 2011, Darch mailed a wholly new "agreement" signed by the Respondents to the Union incorporating a tardy November 8, 2011 wage proposal. GC. Ex. 34(a)-(b). For the first time, the CPA—through Darch—attempted to propose a new tier with a November 1, 2006 cutoff date. Id. This new tier did not appear in any of the exchanged drafts, nor has it appeared in any prior agreement. GC Ex. 5-7. Darch's letter again reiterates the Respondents' position that "they withdrew any offer having that effect or revoked any agreement to a Union proposal having that effect ..." ALJD at p. 18 (emphasis added). There is no dispute that Respondents have, to date, refused to sign the October 28, 2011 agreement.

III. THE FILING AND SERVICE OF THE UNFAIR LABOR PRACTICE CHARGE.

After Darch communicated the Respondents' collective refusal to execute the October 28, 2011 agreement in writing on December 13, 2011 to the Union, 11 the Union filed a timely 8(a)(5) unfair labor practice charge for failure to execute the agreement at Region 13 of the NLRB on December 22, 2011. The Charging Party does not except to any of the ALJ's findings of fact or subsequent conclusions of law related to timely filing, service, and 10(b) issues and, therefore, adopts and incorporates said ALJ findings and conclusions hereto. ALJD at pp. 18-19 (findings of fact), 20-23 (conclusions of law).

ARGUMENT

I. RESPONDENTS' CROSS-EXCEPTIONS TO THE ALJ'S FINDINGS OF FACT ARE EITHER IRRELEVANT OR WITHOUT MERIT.¹²

A. The Respondents Have Recognized The Union As The Collective Bargaining Representative For At Least The Last 30 Years. (Cross-Exception 6)

Darch's December 13, 201, letter also communicated collective attempts to withdraw acceptances and revoke offers on behalf of all Respondents.

Except where noted, the Argument section of the instant brief responds to Respondents' Cross-Exceptions by organizing them into the following categories: (1) exceptions solely to findings of fact; (2) exceptions solely to conclusions of law; and, (3) exceptions to both findings of fact and conclusions of law.

As a threshold matter, the Respondents' Cross-Exception to the ALJ's finding that Respondents have recognized the Union for at least thirty (30) years is immaterial to the determination of the pivotal issues in this case. Respondents admit in their statement of facts that "[f]or approximately thirty years, Respondents [with the exception of LAZ Parking] have recognized the Union as the exclusive collective-bargaining representative of their respective employees in a bargaining unit consisting of employees who hold various parking positions." RCE at p. 3. The Charging Party has no quarrel with recognizing that Respondent LAZ Parking has recognized the Union since 2006 and that all other Respondents have recognized and bargained with the Union for at least thirty years. The distinction is irrelevant for the purposes of deciding this case.

B. The Respondents' Cross-Exceptions To Certain ALJ Findings Related To The Wage Scale Are Immaterial. (Cross-Exceptions 7, 8, 9)

Respondents go through great length to ferret out any plausible exception to the ALJ's findings related to the wage scale. The exceptions here are immaterial, and Respondents wholly fail to articulate how their wage scale exceptions, even if viable, are relevant to the outcome of this case. The Record evidence clearly shows that the 1996-2001 collective bargaining agreement contained a five year wage scale and a wage scale containing five increases over three years. (GC Ex. 5). This distinction and exception that Respondents make is immaterial to the determination of the pivotal issues in this case.

Likewise, Record evidence and testimony from Respondents' witnesses recognized that wage scales over the history of the contract were designed to allow those in the lower scale to catch up to those in the higher scale over the course of the contract (or contracts). Respondents' Cross-Exceptions on this immaterial point are also contrary to their statement of facts. In their

statement of facts, Respondents state that "the wage tier applicable to new hires enabled their wages to theoretically "catch up" to the wages of the existing employees" and "in the 2001-2006 CBA, the two wage scales 'caught up' and contained identical maximum wage rates after five years of service . . ." RCE at pp. 3-4. Yet, in their argument, Respondents contradict their statement of facts by arguing that the ALJ erred in making the finding because he included the phrase "by the end of the 5-year contract term." RCE at p. 22. However, Respondents fail to recognize that the ALJ stated that this would happen "at least in theory." Clearly, that theory would be if an individual was hired at the beginning of the contract term. Again, the distinction drawn in Respondents' Cross-Exceptions are is immaterial, and the wage numbers in the contracts speak for themselves.

C. The ALJ Correctly Determined That The Union Communicated All Proposals In Good Faith. (Cross-Exceptions 13, 14).

Respondents' repeated argument that the Union, its counsel, and its officers willfully and unethically sought to deceive Respondents' seasoned attorney and bargaining representatives during negotiations has absolutely no basis in the Record or reality. Moreover, the vehement manner with which Respondents proffer this argument in its Cross-Exceptions and Answering Brief to the Union's and Counsel for the General Counsel's Exceptions is extraordinarily overzealous, at best, and should be summarily ignored by this Board. As the Record clearly demonstrates, the Union at all times communicated all of its proposals both verbally and in writing not only repeatedly, but clearly, often highlighting to Respondents' counsel the changes made and where the wage scales when included or not included and why.

At the opening bargaining session in September of 2011, the Union presented its original proposal including the wage charts, which while not in non-redline formatting for better readability, but changes were clearly signaled by the Union for the Employer in red with asterisks

on the proposal itself which reads, "the following charts are not in redlined format." Tr. 115, 281. ¹³ During his presentation of the Union's proposal, John Coli Jr. also verbally made the formatting issue clear and specifically said that, "the wages are not in redline but the wages themself are changed." Tr. 281. Respondents and Schwartz as Respondents' bargaining representative all had copies of the old contract and can all, presumably, read and compare simple numbers. If they could not, they never communicated such inability to the Union. The ALJ credited Mr. Coli's testimony on this point (ALJD at p. 6, fn.12), and Respondents' Cross-Exception to the finding is merely an exception to a credibility finding. The Board has repeatedly stated that "the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Babi I*, 194 LRRM 1344 (NLRB, 9/26/12), *citing Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd*. 188 F.2d 362 (3d Cir. 1951).

The Union, likewise, painstakingly handheld Respondents' counsel during the drafting of the final agreement between the dates of October 18 and October 28, 2011. In an abundance of caution and to be absolutely clear about what the exact agreement was, the Union's General Counsel then incorporated the agreed upon changes and sent the proposed final draft document to Schwartz on October 18th. Tr. 140, 320; GC Ex. 16A-B. The final draft included the agreed upon November 1, 2011 cutoff date as well as the two-tier wage system as proposed and agreed to by the CPA and the Union. *Id.* ¹⁴ The actual cutoff date of November 1, 2011 clearly appears approximately eight times in all capital boldface letters throughout the final draft. Tr. 141, 320;

As testified to by multiple Union witnesses, redline formatting within the parameters of the charts would cause misalignment of the wage progressions, making it harder to see the actual yearly progression and corresponding wage amounts being offered. Tr. 115, 281.

¹⁴ The Respondents are apparently in agreement on the wage scale of those hired on or after November 1, 2011. GC Ex. 27(b) pp. 7 and 8. To maintain the \$2.00 differential between tiers as in the 2006-2011 CBA, the last year wage of 5 year employees in the "hired after" tier must be two dollars less than the last year wage of 5 year employees in the "prior to tier." The Union's CBA maintains that \$2.00, the Employer's creates an entirely new tier.

GC Ex. 16B. All of the wage amounts were included in the final draft sent to Respondents on October 18, 2011. Id. Respondents, by and through Schwartz, provided no response articulating a change to the included two-tier wage system. Id. Having received no response from Schwartz, Ms. Brinson again sent the final draft to Schwartz on October 21st again including in the same contract draft the same wage scales and cutoff date in all capital boldface letters. Tr. 143; GC Ex. 17A-B at p. 7-8. Since it was a final draft, Ms. Brinson did not originally send it in redline. However, upon request from Schwartz, it was sent on October 25, 2011 after Ms. Brinson received consent and direction from her client to send the Word document. GC Ex. 18-A-B, 20A-B, 35. It should be strongly emphasized that a Word Document that can be edited and changed is highly confidential propriety of any client, and any attorney-including Ms. Brinson- should seek consent before distributing a Word document to any outside party even if the "demand" is repeatedly made, which is what Ms. Brinson did. Neither Schwartz no the CPA is Ms. Brinson's client. To suggest that Ms. Brinson should have acted otherwise, as Respondents do in their Exceptions to this Board, is to suggest that she act unethically and without the best interest of her client. Certainly, Respondents are not suggesting such.

As previously articulated during the first bargaining session on September 27, 2011, the wages were not in redline due to readability and formatting. Ms. Brinson, as a reminder, pointed this out again to Schwartz in the email stating, "I did not include wage scales. The wage scales are in the prior versions I have sent you." *Id.*; Tr. 148. The prior version did, in fact, include the two-tier wage system with wage rates and the November 1, 2011 cut-off date. GC Ex. 17A-B at p. 7-8. The actual charts in the redlined version did however include the November 1, 2011 cutoff date in all capital boldface letters. GC Ex. 18 A-B; 20 A-B, 35. At no point during these communications did the Respondents or Schwartz ask for any changes to the wage provisions as

drafted and repeatedly provided to the CPA in the final agreement sent to Schwartz on October 18th and 25th. Tr. 151, 329; GC Ex. 21. All negotiated clarifications were then incorporated into the final draft and sent to Schwartz the same day, in redline version, per Schwartz's request. Tr. 153 330; GC Ex. 23A-B. The two-tier wage system with a November 1, 2011 cutoff date appeared eight times in article 8.2 and 8.3 of the final draft in all capital boldface letters. *Id*.

Ms. Brinson again incorporated the changes into the agreement and resent the final draft to Schwartz, including the two-tier wages as presented on September 27, 2011 and in every subsequent draft. Tr. 161, 336-337, 767-770. GC Ex. 26A-B. Upon receipt of the final draft Schwartz at 1:40 p.m on October 28 accepts "we [i.e. the CPA] are fine with the change(s)", at which point Ms. Brinson sent the final agreement to Schwartz in both Word and PDF as a courtesy. GC Ex. 27A-B, Tr. 337, 767-768,770,782. In the final written agreement document, all of the wage rates and provisions remained the same, the applicable amounts were included, the two-tier systems were maintained, and the cutoff date of November 1, 2011 were included. Id. Needing no further changes, Schwartz, on behalf of the CPA, responds on October 28 at 12:57 p.m. that the CPA is "in accord" with the attached agreement. Id.; Tr. 334, 767. GC Ex. 25A-B. The attached agreement and email articulating that the CPA was "in accord" was also sent by Schwartz to Jim Buczek, Mike Prussian, and Jim Doria (from Standard Parking). Tr. 158,562; GC Ex. 25A-B. Schwartz sent another email at 1:40 p.m. stating he was "fine" with a minor change and again in agreement. GC. 27(a). In his attached final agreement and email, Schwartz makes no changes to the wage provisions, two-tier system, or cutoff date. Id. 15

¹⁵ It should be noted that even if the Counsel for the General Counsel argues that the "agreement" reached was at 12:57, this does not affect the Union's position or argument of 1:40 being the operative time. The 12:57 p.m. email clearly articulates Agreement from the CPA, which was again memorialized at 1:40 p.m. GC 27(a).

It is difficult, if not impossible, to understand the Respondents' insistence that the Union should have done more to explain the wage scales other than to repeatedly type out the numbers in black and white and repeatedly send them to Respondents' bargaining representative, a seasoned labor attorney. To suggest that the aforementioned meticulous communications to Respondents' was unethical is simply unwarranted and should be ignored both in Respondents' Cross-Exceptions 13 and 14 and in Respondents' answer to the Union's and Counsel for the General Counsel' exceptions to the ALJ's Decision and Recommended Order.

II. RESPONDENTS CROSS-EXCEPTIONS TO THE ALJ'S CONCLUSIONS OF LAW ARE WITHOUT MERIT.

A. ALJ Not Required to Address All Arguments Presented By A Party (Cross-Exception 1)

It is not imperative that the Board remand the entire case to the ALJ for findings on alternative arguments presented by the Respondents, and Respondents cite no case law requiring such a procedural measure. In any event, the Board can easily review the Record evidence and determine that the Respondents' alternative theories on this case are equally without merit.

Not only does the Record demonstrate that for the last 30 years the Union officials have negotiated the terms and conditions on behalf of the parking industry membership without a condition precedent (as previously argued), but as will be argued, *infra.*, and as admitted in the Amended Answers of Respondents (GC Ex. 1(o)-(s) at ¶ IV of Defenses, p. 6), it was the Respondents, not the Union, accepting offers in the contract formation process: Respondents "revoked is acceptance of those modifications before the membership of Teamsters Local 727 ratified the modifications . . ." *Id.* Prior to that acceptance of the CPA communicated by Schwartz on October 28, 2011 at 1:40 p.m., the Union never withdrew its last counter-offer made on October

28, 2011 at 1:38 p.m. (See Addendum A, attached to Union's Exceptions to the ALJD). Accordingly, immediately upon acceptance by Schwartz, a contract was formed. This is merely basic application of fundamental contract law.

Also, in defense of the Respondents' unlawful conduct in failing to execute the agreement entered into on October 28, 2011, the Respondents make an ineffectual claim that it withdrew its previous offer. (Amended Answer at ¶5 of Defenses; GC Ex. 1(o)-(s)). As previously established, Schwartz had the actual and apparent authority to agree to the finalized October 28, 2011 version of the contract on behalf of each and every member of the Chicago Parking Association (including but not limited to each named Respondent). ALJD at pp. 23-24; GC Ex. 13-17, 21-23, 25-27, 29, 31. Additionally, there was no condition precedent that union membership ratification was required prior to a binding agreement being reached. ALJD at pp. 5-6, fn.9; Tr. 111, 298, 623, 625. Accordingly, the clear Record evidence establishes that if a withdrawal occurred, it occurred after the offer and acceptance of the finalized version of the contract on October 28, 2011 at 1:40 p.m.

As any first year law school student can recite on cue, where an offer has been accepted, there is a binding contract. As re-stated in *Ben Franklin*, 278 NLRB 986 (1986),

"A complete package proposal made on behalf of either party through negotiations remains viable, and, upon acceptance in toto, must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance, or defeased by an event upon which the offer was expressly made contingent at a time prior to acceptance."

Ben Franklin, 278 at 992, quoting Pepsi-Cola Bottling Co. of Manson City, Iowa, 251 NLRB 187, 189 (1980). As previously established, the offer presented by the Respondents was not expressly made contingent any time prior to acceptance; and vice versa, any offers presented by the Union

¹⁶ Again, it should be noted that should the Counsel for the General Counsel assert the agreement was at 12:57 p.m., that does not undermine the Union's or the GC's position that agreement was clear and repetitive.

were, likewise, not expressly made contingent at any time prior to acceptance. As demonstrated in Addendum A, attached to Union's Exceptions to the ALJD, the contract in concept as well as the actual written document were both formed when Fred Schwartz, on behalf of the named Respondents including the Chicago Parking Association, accepted offers presented to them by the Union: 10/13/2011, 5:36 p.m.: Respondents offer (GC Ex. 13); 10/13/2011, 6:40 p.m.: Union counter offers (GC Ex. 14); 10/14/2011, 10:33 a.m.: Respondents accept (GC Ex. 15)(See Addendum A, attached to Union's Exceptions to the ALJD). The Union could have stopped here and validly claimed that there was a binding contract. However, in an over-abundance of caution, the Union deliberately reduced the agreement to a full written document including all agreed upon terms and conditions of employment, painstakingly drafted and redrafted the contract for Schwartz at his request until the entire document was fully agreed upon so that no question could ever be raised about what, exactly, was the full written contract:

- 10/18/2011, 12:14 p.m.: Union offers full written CBA (GC Ex.. 16)
- 10/21/2011, 10:48 a.m.: Union offers same full written CBA (GC Ex.. 17)
- 10/28/2011, 11:09 a.m.: Respondents Counter-offer full written CBA (GC Ex., 21)
- 10/28/2011, 11:54 a.m.: Union counter-offers full written CBA (GC Ex.. 21)
 - Counters on only remaining provisions, Sections 14.2 and 40.5
- 10/28/2011, 12:03 p.m.: Employer counter-offers full written CBA (GC Ex.. 22) Employer agrees to 14.2; counters on 40.5
- 10/28/2011, 12:05 p.m.: Union counter-offers full written CBA (GC Ex.. 23)
 - Counter on only remaining provision, Section 40.5
- 10/28/2011, 12:57 p.m.: Respondents counter offers full written CBA (GC Ex.. 25)
 Counter on only remaining provision, Section 40.5
- 10/28/2011, 1:38 p.m.: Union counter-offers full written CBA (GC Ex.. 26)
 Counter on only remaining provision, Section 40.5
- 10/28/2011, 1:40 p.m.: Respondents accept full written CBA (GC Ex.. 27)
 Respondents accept last remaining provision, Sec. 40.5
- 10/28/2011, 3:07 p.m.: Union sends courtesy copies of CBA as agreed upon at 1:40 p.m. (in both PDF and Word versions)

(See Addendum A, attached to Union's Exceptions to the ALJD). At no point between the Union's offer on October 13, 2011 at 6:40 p.m. and the Respondents' acceptance on October 14, 2011 at 10:33

a.m. did the Union withdraw its offer. *Id.* Likewise, at no point between the Union's counteroffer made on October 28, 2011 at 1:38 p.m. related to the written document and the Respondents' acceptance on October 28, 2011 at 1:40 p.m. did the Union withdraw its offer on the full version of the written contract. *Id.* Accordingly, the Respondents' attempt to revoke its acceptance(s) on November 2, 2011 (GC Ex.29) and November 8, 2011 (GC Ex. 31) are untimely pursuant to fundamental, rudimentary contract law. The defense proffered by the Respondents that it withdrew its offer(s) (GC Ex. (o)-(s) at ¶V of Defenses) should, therefore, be rejected.

B. The Union's Ratification Process Was Not A Condition Precedent To Contract Formation. (Cross-Exceptions 10, 11, 12)¹⁷

Respondents' argument that the ALJ "purportedly declined" to address their ratification argument mischaracterizes the ALJ's Decision. Respondents' Cross-Exceptions themselves highlight the actual findings related to whether ratification was a condition precedent. RCE at pp. 42-43. "I do not find that Coli, Jr. made ratification a condition precedent to the parties reaching agreement . . . the evidentiary record shows that . . . Coli, Jr. . . . never took the position that ratification was a condition precedent to an enforceable agreement. . . . [and] Coli, Jr. did not say, however, that ratification was a prerequisite to the parties working out a valid and effective contract." ALJD at 5-6 fn9, 8 fn16, fn18. Accordingly, the ALJ did make a finding, and that finding was that the Respondents failed to submit sufficient Record evidence of a condition precedent. Respondents own exceptions (Cross-Exceptions 10, 11, and 12) identify these findings

It should be noted that in their ratification/condition precedent argument, Respondents admit that there as no final agreement on October 14, 2011, which is contrary to their position related to contract formation. RCE at pp. 45-46. Respondents acknowledge that "on October 28... [the parties collaborated] to finalized contract language and refine the parties' tentative agreement." RCE at p. 46.

Similar to the Respondents' conflated argument regarding "express authority" and "implied authority" related to the service issue in this case, here, also, it should be noted that Respondents argue that the ALJ both "purportedly declined" and engaged in an "express refusal to fully address Respondents' ratification argument." RCE at pp. 42, 43. Charging Party submits that the ALJ did neither.

as conclusions of "law;" therefore, to argue that the ALJ did not make a conclusion of law related to the issue of a condition precedent is contrary to the Respondents' own Cross-Exceptions.

The ALJ can only consider evidence that a party presents, and, here, the ALJ found no factual evidence supporting a condition precedent argument. Had Respondents presented more credible evidence on the issue, perhaps their additional arguments would have warranted further analysis by the ALJ. However, they failed to do so. As with many issues raised in this case, whether the Union's ratification process was a condition precedent in this case is simple, but the Respondents seek to make the simple fact, muddied. There are no complex nuances related to condition precedent here, as the Respondents suggest. Instead, the ALJ properly determined that there was a clear lack of Record evidence. The ALJ's findings are supported by the case law.

As recognized in *Ben Franklin*, "[i]t is well established that a principal may limit its agent's negotiating authority by affirmative, clear and timely notice to the other party that any tentative agreement is contingent upon subsequent ratification." *Ben Franklin*, 278 NRLB at 986. Respondents fail to address this case in their Cross-Exceptions. In the instant case, there was no affirmative, clear or timely notice by either party of such a condition precedent. Furthermore, the argument proffered by the Respondents in this matter that a condition precedent requiring membership ratification before there can be a binding contract flies in the face of Board case law now well-settled since 1958. In *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958), another case not addressed by Respondents, the Board announced clear rules of law related to the condition precedent of union membership contract ratification that are, to date, still standing:

The Board, in reexamining this extension of the general rule, is of the opinion that <u>only</u> where the written contract itself makes ratification a condition precedent to contractual validity shall the contract be no bar until ratified.

Appalachian Shale, 121 at 1162 (emphasis added). In other words, Appalachian Shale makes it abundantly clear that the condition that membership ratification is required before there can be an effective contract is only effective where that condition precedent is in the "written contract itself." Id. In the instant case, neither the expired contract nor the contract agreed to on October 28, 2011, or any other contract in the thirty year history of this bargaining relationship has there ever been a "written contract itself mak[ing] ratification a condition precedent to contractual validity." Id. To date, Appalachian Shale has not been overturned on this rule of law and should be applied here.

In fact, the *Appalachian Shale* Board clearly explained its reasoning for the clarification of the application of its general rule related to membership ratification as a condition precedent:

However, the rule has been applied not only to contracts which by their own express terms create such a condition precedent but also to situations in which the contract was silent as to prior ratification but such a condition precedent was spelled out from an alleged understanding of the parties at or about the time of the contract negotiations. The latter has resulted in conflicting testimony and protracted hearings, creating contested factual issues for the Board to resolve. The Board, in reexamining this extension of the general rule, is of the opinion that only where the written contract itself makes ratification a condition precedent to contractual validity shall the contract be no bar until ratified. . . . in all cases where the question of prior ratification depends upon an interpretation of a provision for prior ratification in a Union's constitution or bylaws, as distinguished from the incorporation of an express provision in the contract, the contract will constitute a bar. Accordingly, the rule for prior ratification is restated as follows: . . . if the contract itself contains no express provision for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar.

Appalachian Shale, 121 NLRB at pp. 1162-63 (emphasis added). In the instant case, the Respondents' entire argument related to union membership ratification is entirely based upon a misinterpretation of the IBT Constitution and the Bylaws of Charging Party. Not only did the testimony of John T. Coli and John Coli Jr. credibly refute the Respondents' arguments that the Constitution, the Bylaws, and/or an "alleged understanding of the parties at or about the time of the contract negotiations" required union membership ratification prior to there being an effective and binding contract (Tr. 497,513,625.), but it is also entirely irrelevant to the instant application

of the now well-settled rule. Instead, the Respondents have unnecessarily attempted to muddy the issue with "conflicting testimony and protracted hearings creating contested factual issues" based upon "an interpretation of a provision for prior ratification in a Union's constitution or Bylaws." The *Appalachian Shale* Board specifically reexamined and clarified its rule that the prior union membership ratification is <u>only</u> required for a contract to be effective where it is expressly written in a contract provision—all else is irrelevant, and consideration of such evidence should be avoided by the trier of fact. As clearly established in the Record, the instant contract does not and has never contained an "express contractual provision" requiring ratification as a condition precedent to contractual validity. Accordingly, union membership ratification was not required prior to effective contract formation, October 28, 2011 at 1:40 p.m., and all evidence presented by the Respondents (including but not limited to Bylaws (R. Ex. 3), the IBT Constitution, postage (R. Ex. 8), and or any testimony related to an "alleged understanding") should not be considered by this Judge as it is contrary to now well-settled Board law.

Finally, it should be noted that Respondents' condition precedent argument is based upon a footnoted exception to multiple credibility findings related to the testimony of Schwartz and John Coli Jr. RCE at p. 45, fn15. The Board has repeatedly stated that "the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Babi I*, 194 LRRM 1344 (NLRB, 9/26/12), *citing Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd*. 188 F.2d 362 (3d Cir. 1951). The Respondents have failed to present by a clear preponderance of all the relevant evidence that any of the ALJ's credibility findings—including but not limited to the testimony of Schwartz and/or John Coli Jr. related to ratification and condition precedent—

were in error. RCE at p. 45, fn15.¹⁹ Accordingly, the Board should deny the exceptions related to condition precedent and the Union's ratification process because they are, in part, based upon credibility determinations.

- C. The ALJ Correctly Concluded That Service Of The Unfair Labor Practice Charge Was Perfected Within The 10(b) Period. (Cross-Exceptions 15-19, 21)²⁰
 - 1. The ALJ Correctly Concluded That Darch Had Implied Authority Of Respondents To Accept Service Under Well-Settled Board Law And Federal Rules Of Civil Procedure. (Cross-Exceptions 15-17, 19).

Under ordinary agency law, as adopted by the NLRB and incorporated into the Federal Rules of Civil Procedure, "service of process on an authorized agent constitutes effective service on the agent's principal." *United Electrical Contractors Assoc. et. al*, 347 NLRB 1 (2006) citing to Restatement (Second) of Agency Section 268 (1958) and Fed. R. Civ. P. 4(h) (1). The Board in *United Electrical* held that, "authorization to accept service on behalf of a principal may be implied from the surrounding circumstances." *Id. citing Focus Media, Inc. v. Pringle*, 387 F.3d 1077, 1081-1083 (9th Cir. 2004). Additionally, "under traditional rules of agency law, an agent is deemed to have authority to perform acts incidental to those expressly authorized by the principal." *Id., citing* Restatement (Second) of Agency Sec. 35. In *United Electrical*, the respondents belonged to a 50 member bargaining association UECA. UECA was served with a copy of a ULP charge within the 10(b), after which the individual members of the UECA disputed service, arguing that they were not individually served with a copy of the charge. *Id.* The Board found that, despite not having served individual employer members, "section 10(b) [did] not bar the complaint against

¹⁹ It should also be noted that in excepting to credibility findings related to its argument of condition precedent, Respondents wholly fail to cite to any Record evidence. RCE at p. 45, fn15.

Respondents characterize Cross-Exceptions 17 & 18 as exceptions to findings of fact and conclusions of law. For the purpose of clarity, Cross-Exceptions 17 & 18 will be covered in the instant section with other Cross-Exceptions to conclusions of law related to the service issue.

the individual employer-members of the UECA." *Id.* In support of its finding, the Board observed that 10(b) of the Act has been interpreted by the Board to "require personal service of the charge upon the person charge or his *agent.*" *Id.*, *citing Sewanee Coal Operators Assn.*, 167 NLRB 172,177 (1967). The Board explicitly held that the UECA was the bargaining agent and was duly served with a copy of the charge within the 10(b) period.

In the instant case, similar to United Electrical, all of the Respondents belonged to the Chicago Parking Association for years and had at all times appointed an attorney as their collective agent to represent the CPA on the individual employer's behalf during bargaining. Tr. 185,297,408, 421, 426, 431, 445, 462. In fact, all of Respondents paid dues to the CPA equally sharing the cost of bargaining as a collective association. Tr. 722. Prior to Darch stepping into the shoes of Schwartz, Schwartz represented the CPA on behalf of all of the members as their collective agent and was the sole chief bargaining agent and negotiator for the CPA (2002 and 2011). Tr. 110-113, 298,462,487. All communications and negotiations flowed through Schwartz. GC Ex. 8-10, 13-16, 18, 20, 26-27, 29-30,35. When Schwartz agreed to the new contract on behalf of all of the members of the CPA, he was fired. Tr.341. At that time, Darch stepped into Schwartz's role and became the new negotiator and agent for the CPA as evidenced by numerous communications, letters and meetings held with the Union and the CPA where Darch directly introduced himself as the representative for the CPA. GC Ex. 38, 40; Tr. 186, 190, 347, 409-410, 422, 427, 432, 448. Furthermore, Darch filed appearances, answers, and defenses on behalf of the CPA subsequent to the ULP charge being filed. GC Ex. 40(b); Tr. 410, 423, 427, 433, 450. Similar to United Electrical, the CPA had a specified agent, Douglas Darch, who was similarly served a copy of the ULP charge against the CPA. GC Ex. 1(b).

Assuming arguendo that Darch was not an express authorized agent of the CPA, the "surrounding circumstances" demonstrate that authorization to accept service on behalf of the principal (i.e. the CPA and Respondents) can be implied. Here, Darch outwardly represented himself as the sole representative for the CPA, all communications, settlement discussions and ultimately service of the charge flowed solely through him. Based on the circumstances of this case, it is clear that Darch was the authorized agent for purposes of service or, in the alternative, had the implied authority to accept service on behalf of the Respondents due to the facts and circumstances of this case. Therefore, the Board should find, as the Board did in *United Electrical*, that service on the Respondents' agent Douglas Darch constituted service on the Respondents themselves, thus, satisfying the requirements of 10(b) of the Act.

In their Cross-Exceptions, the Respondents essentially request that this Board overturn its prior *United Electrical* decision and, instead, apply Respondents' alternative reading of a Ninth Circuit bankruptcy case, *Focus Media, Inc. v. Pringle*, 387 F.3d 1077 (9th Cir. 2004). The Board should deny Respondents' request. Additionally, Respondents' analysis of *Focus Media* is overly broad and simplistic and does not fully articulate the Court's holding and, therefore, obfuscates the Board's proper application of *Focus Media* in *United Electrical*.

First, Respondents' Cross-Exceptions conflate the concepts of actual, apparent, express, and implied authority, all of which have different definitions. Case law cited by all parties in this case, including but not limited to *United Electrical* and *Focus Media* focus on implied authority. Respondents cite to ALJ findings that Respondents may not necessarily have cloaked Darch with actual or express authority for service of process as evidence that he did not have implied authority. Respondents' recitation of facts of express authority do not correlate to the legal analysis of implied authority.

Focus Media, for example, is a bankruptcy case centered on the analysis of implied authority to accept service of process, not express. The holding from Focus Media cited by Respondents is related to implied authority to accept service under the bankruptcy code of civil procedure, which was, "an agent of [a] defendant authorized by appointment . . . to receive service of process . . . can include an agent impliedly authorized to accept service of process on a client's behalf if (1) the agent is the attorney representing the party in the related bankruptcy proceeding, and (2) the totality of the surrounding circumstances demonstrates the intent of the client to convey such authority." 387 F.3d at 1083 (emphasis added)(internal quotations omitted). The Court further determined that "[t]he critical inquiry in evaluating an attorney's authority to receive process is, of course, whether the client acted in a manner that expressly or impliedly indicated the grant of such authority." Id. (emphasis added), quoting Olympus v. Dealer Sales & Serv., Inc., 107 F.R.D. 300, 305 (EDNY 1985). Again, Respondents incorrectly focus on express authorization by pointing to each corporation's registered agent for service of process as if that individual/entity is the sole agent who can accept service under the law in Illinois, which is clearly not the case. 735 ILCS 5/2-204.21

In the instant case, Respondents clearly "acted in a manner that . . . impliedly indicated the grant" of Darch's authority to receive process, which included any and all of the following:

- Terminating Schwartz from his duty of representing Respondents during Negotiations and immediately replacing him with Darch (ALJD at p. 17; Tr. 739);
- On November 17, 2011, Darch verbally communicating with the Union on behalf of Respondents related to contract negotiations on November 17, 2011 (ALJD at p. 17); and,
- On December 13, 2011, Darch sending written correspondence on behalf of all

²¹ "A private corporation may be served (1) by leaving a copy of the process with its registered agent <u>or</u> any officer or agent of the corporation found anywhere in the State; <u>or</u> (2) in any other manner now or hereafter permitted by law. A private corporation may also be notified by publication and mail in like manner and with like effect as individuals."

Respondents to the Union communicating their collective rejection of the CBA, refusal to sign, and offer of a different collective agreement (ALJD at pp. 17, 18; GCEx. 34(a)-(b)).²²

The final action of the December 13, 2011, written correspondence of Darch on behalf of all Respondents during the course of contract negotiations directly triggered the Union's response of filing the instant underlying unfair labor practice charge. The "totality of the surrounding circumstances" of Darch's actions on behalf of Respondents during contract negotiations, and Respondents' conduct of allowing Darch to speak on their collective behalf at this time during negotiations is directly "related" to the subsequent unfair labor practice charge; indeed, it was the cause of the instant charge. 387 F.3d at 1083. Accordingly, pursuant to *Focus Media*, the case relied upon by Respondents in their collective Cross-Exceptions, Respondents cloaked Darch with the implied authority to receive process of the instant unfair labor practice charge, which was perfected within the 10(b) period.

- 2. The ALJ Correctly Concluded That The Union Served All Respondents with the ULP charge within 6 months of the allegation. (Cross-Exception 18).
 - a. The Respondents' Actual Knowledge of the Underlying ULP Charge is Sufficient to Satisfy Service Requirements Under 10(b)

Where a party has actual notice/knowledge of an unfair labor practice charge the Board is willing to find compliance with Section 10(b) without strict adherence to mechanical service procedures designed to protect unsavy respondents from unwarranted liabilities. *United Steelworkers of American*, et. al., 2000 NLRB LEX.IS 495 (2000); *Local Union No. 250, United*

Respondents have not filed exceptions to these findings of fact, and they should, therefore, be accepted. Respondents' Cross-Exception 16 related to the ALJ's conclusion that Darch was engaged in "continued 'negotiations" regarding the wage scale is contradicted by the Respondents' failure to file cross-exceptions related to the findings of fact that Darch, on behalf of the collective behalf of Respondents, communicated alleged counter-offers, attempts to revoke, and attempts to withdraw on December 13, 2011, all of which are signs of contract negotiations—tardy or not.

Assoc. of Journeymen et. al., 311 NLRB 491,496 (1993); American Steamship Co. et. al., 222 NLRB 1226, 1231 (1976). The Board in Local Union No. 250 and American Steamship Co. held that since counsel for the Respondent had actual notice (i.e. knowledge) of the ULP charge within the six months after the commission of the ULP, the charging party had complied with the service requirements under Section 10(b) of the Act, despite respondent not having actually received a copy. Id. In Local Union No. 250, the respondent argued that the Board could not enter a remedial order because the respondent was not "served" with a copy of the charge within the six month 10(b) period. Id. The respondent was, however, "served" via certified mail with a copy of the complaint that issued as a result of the underlying charge within the 10(b) period. Id. The respondent's counsel acknowledged receipt of said complaint and filed an answer to the complaint. Id. The Board, in finding timely service, held that respondent had actual notice of the charge and was "fully apprised of the substance of the.....charge within six months of the date of commissions of the ULP alleged in the complaint," as evidenced by the filing of an answer and participation in the Region's investigation. Id.

Even in the case of misnomer, where the respondent union was not even named in the charge (and therefore was not served), the Board found service due to the respondent's actual knowledge of the charge and subsequent participation stating that such error "does not invalidate the charge where there has been actual notice of the charge to the person or organization for whom the charge was intended." *Id.* at 1231. Additionally, the Board noted in *Local 250* that the respondent was not prejudiced "either in its preparation or presentation of defenses to the matters by non-receipt of the...charge since both the respondent and its counsel were privy to [the Regions] investigation... [and] saw the complaint." *Id.* (See also, *Dilling Mechanical Contractors Inc. et. al.*, 357 NLRB No.56, at 45 (2011) where the Board notes the lack of "meaningful prejudice" as a

reason to dismiss the argument of non-compliance with 10(b)); United Steelworkers of America, 2000 NLRB LEX.IS 495, at 12 (holding that complaints that were served and answered by the respondent "are further proof of service since no showing of prejudice has been made." Id., citing Buckeye Mold & Die, 299 NLRB 1053, 1054 (1990)); Engineers Union, 311 NLRB at 1055 (1993).

In the instant case, the Union filed an unfair labor practice charge on December 22, 2011. GC Ex.1(a). Prior to filing the charge, Douglas Darch outwardly represented himself to the Union as the representative and agent for the Chicago Parking Association on numerous occasions. GC Ex. 32; Tr. 186, 347. Unlike Local 250, the CPA's counsel did actually receive a copy of the ULP charge via certified mail on December 22, 2011. GC Ex.1 (b). Subsequent to receipt of the charge, as testified to by the Respondents, Darch presented the charge to the Respondents and discussed their proposed response. Tr. 409-410, 422, 427, 432, 448. Similar to Local 250, the Respondents' counsel was fully apprised of the substance of the charge as evidenced by their participation in meetings with the Union during which the charge, settlement and resolution of the charge and its liabilities were discussed. GC Ex. 32, 38; Tr. 186, 195, 197. All of the above occurred within the 10(b) six month period. Further, at no point during any of the meetings, conversations or correspondence with the Union did the Respondents or Darch ever state that they were not served with the ULP or had no knowledge of it. The Union, having sent all prior correspondence regarding the underlying contract through Darch²³, reasonably believed Darch to be the representative and agent of the CPA. If Darch did not believe his clients had been served, his conduct and the conduct of his clients demonstrated otherwise and caused undue delay in properly filing and serving the charge. Despite this, all of Respondents had actual knowledge of the charge, filed appearances,

²³ Prior to Darch, Schwartz.

and responded to the charge via Darch, similar to the Respondents in *Local 250*. Tr. 410, 414,423, 424,427,428,433, 435,450; GC Ex. 40.

As was the case in *Local 250*, here, the Respondents have presented no evidence nor have they alleged any prejudice or harm as a result of service of the charge.²⁴ In fact, the evidence demonstrates that all Respondents were aware of the charge and that their legal representative, Darch, repeatedly corresponded with the Union in writing on behalf of the Respondents in an effort to settled the charge and resolve well-known liabilities, never once raising an issue of improper service. *Id.*; GC Ex. 42; Tr. 351, 199, 348,415. Therefore, the Board should deny Respondents' Cross-Exceptions and find that becuase the Respondents had actual knowledge of the charge and suffered absolutely no prejudice by not receiving a mailed copy that the Union satisfied 10(b) of the Act.

b. The Purposes and Policies Behind Section 10(b) of the NLRA Require a Finding of Proper Service

While the Respondents argue that the Board should require strict compliance to rule 102.14-102.15 of the Board's Rules and Regulations requiring service on of the charge, long standing Board law holds that, "the rules and regulations...shall be liberally construed to effectuate the purposes and provisions of the Act." *Rochester Musician Assoc. et. al.*, 207 NLRB 647, 649 (1973). In *Rochester Musician*, the Board found proper service where the charge was served before it was actually filed, holding that strict compliance with the language of the rules (requiring service after filing of the charge) was not required where such strict construction would not effectuate the purposes and policies of the Act. *Id.* The purposes of adhering to §10(b) of the Act are wholly satisfied here. The purpose and policy behind the 10(b) limitations, as observed by the United

²⁴ Indeed, Respondents have not even alleged any prejudice as a defense in this matter. See Respondents' amended answer to the complaint GC Ex. 1(0)-(s).

States Supreme Court, are meant "to bar litigation over past events after records have been destroyed, witnesses have gone elsewhere, and recollection of the events in question have become dim and confused." *Machinists Local 1424 et al. v. NLRB*, 362 U.S. 411, 419 (1960) citing to H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40.

In the instant case, the charge was filed well within the 10(b) period, and all of the Respondents had actual notice of the filing through their attorney Douglas Darch and direct communications with the Union within the 10(b) period as evidenced by their position statements and meetings with the Union. Tr. 410, 414,423, 424,427,428,433, 435,450; GC Ex. 40. No records were destroyed, no witnesses went missing, and none of the Respondents alleged a failure to recall the events in question. Therefore, the policies and purposes of Section 10(b) are met here, and the Board should find that there was proper and timely service under Section 10(b) of the Act.

As will be addressed further, *supra.*, one of Respondents' primary cases relied upon in their arguments related to service an underlying Board case that was reversed by the Ninth Circuit Court of Appeals, *Westbrock Bowl*, 274 NLRB 1009 (1985). However, because that case was properly overturned, as noted by the NLRB in *Buckeye*, perhaps a second look at the reasoning of the dissent in that overturned case should be noted:

I believe it is a miscarriage of justice to hold that the General Counsel did not perfect service and to dismiss the complaint. I would find, at a minimum, that the [r]espondent had actual notice of the charges against it, was fully apprised of the complaint allegations, and was not prejudiced by the alleged nonreceipt of the charges.

274 NLRB at 1009-1010. Likewise in the instant matter where the facts underlying Westbrock and Buckeye are so similar, where all Respondents repeatedly admitted actual notice of the charges, and where there is no prejudice caused to any Respondent by the "alleged nonreceipt of the charge[]," the Board here should not allow the "miscarriage of justice" that the Respondents request here.

c. The ALJ Correctly applied relevant Board law. (Cross-Exceptions 19, 21)

Contrary to Respondents' Cross-Exceptions, *Buckeye Mold & Die*, 299 NLRB 1053 (1990) and subsequent cases applying *Buckeye* do not support the Respondents' position to bar remedial order by the Board under 10(b). First and foremost, *Buckeye* did not involve a dispute regarding the service of an unfair labor practice charge. In fact, in *Buckeye*, both parties acknowledged that service of the charge did not occur within the 10(b) period; however, this defect was cured by the subsequent complaint being served properly and timely. In the instant case, the Union, through no fault of its own, was denied the opportunity to properly and timely serve the complaint within the 10(b) period.²⁵

Further, failure of service in *Buckeye* was also cured by serving the complaint on the respondents' attorney. In the instant case, the Respondents' attorney, Douglas Darch, was originally served with the charge on December 22, 2011. GC Ex. 1(d). In *Buckeye*, the Board noted:

... [the employer's] letter to its employees.... Directed that any questions be referred to its plant manager, Spade. Spade testified that anything addressed to [the employer] he referenced to its attorney, Daily, as he had been instructed to do. Consistent with this instruction, when Union Representative Fada contacted Spade by phone...Spade referred him to Daily....Finally ...Spade responded by letter...formally notifying Fada...that any correspondence relating to the company should be directed to Attorney Daily.... Thus, because the complaint here was served on [the employer's] attorney and agent within the time period prescribed by Section 10(b) of the Act....and in the absence of a claim that such service in lieu of service of the charge in any way prejudiced that Respondent, we find that the service requirements of the Act were satisfied here.

299 NLRB at 1053-54; (See also, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, et.al, 311 NLRB 1031,1054-1055 (1993), holding that under Buckeye

Here, the delay was caused by the Board's investigation and internal processing of this charge (the charge was sent to advice in D.C. on March 26, 2012 and the Region did not issue dismissal until August 28,2012, after Advice directed a Complaint issue, after which the Board's General Counsel overturned the Region and again directed that a complaint issue on February 1, 2013). GC Ex. 1; Tr. 26-27.

service of a charge on respondent's attorney constituted proper service upon the respondent under the Board's rules and regulations.) As articulated above, the facts and circumstances of how the respondent's attorney was held out by the respondent to others, like here, in letters to the union controlled whether respondent's attorney was a sufficient agent for service of process. *Id.* Similarly, in the instant case, Darch (and the members of the CPA) clearly represented himself as the sole representative for purposes of bargaining and agent for all of the charged parties as demonstrated by several letters and meetings and discussions with the Union on behalf of the CPA. GC Ex. 38, 40; Tr. 186, 190, 347, 409-410, 422, 427, 432, 448.

Respondents' application of *Buckeye Molding* and its reliance upon the overturned Board case *Westbrock Bowl*, 274 NLRB 1009 (1985) in their Cross-Exceptions is misleading and should not be considered. Instead of relying upon current Board law, the Respondents rely upon the following conclusion of the overturned *Westbrock* case, "the attorney 'had not been designated as [r]espondents' agent for purposes of service" and inaccurately state that "[o]n appeal, the Ninth Circuit did not disturb this aspect of the Board's decision." RCE at p. 30. Respondents are incorrect. The Board in *Buckeye* specifically found that service of the complaint in *Westbrock* and in *Buckeye* were proper under the Board's rules and regulations. In both cases, the complaint was served on respondents' attorney. In the instant matter, the initial charge itself was served upon the Respondents' attorney. Clearly, when read together, the *Buckeye* and the Ninth Circuit's review of *Westbrock* stand for the proposition that service on a party's attorney can under the totality of the circumstances as are present in the instant case, satisfy Section 10(b)'s requirements.

In the original Westbrock case before the NLRB, the Board noted that the attorney for respondents in that case "had conveyed doubt as to his representative capacity to the Board agent investigating the charges." 274 NLRB at 1009. In the instant case, there is no evidence that Darch

ever conveyed any doubt to the Board agent regarding his representative capacity. Indeed, to the contrary, Darch made repeated filings on behalf of all respondents, filed charges on behalf of the Chicago Parking Association, and made repeated representations to the NLRB and the Charging Party that for all intents and purposes, he was the representative of all Respondents. (GC Exs. 38, 40, 40(b); Tr. 186, 190, 347, 409-10, 422-23, 427, 432-33, 450, 488). In Westbrock, the NLRB also noted that the attorney for the respondents in that case "testified that he had never received copies of the charges." 274 NLRB at 1009. Here, Darch never testified or provided any evidence that he had never received copies of the charges; in fact, it is admitted. Instead, Counsel for the General Counsel presented repeated evidence, and admissions from each and every Respondent, that they were aware of the charge and had seen it. In Westbrock, the NLRB pointed out that in that case "there ha[d] been no finding that the [r]espondent's attorney provided statement of position to the Board agent." Id. Again, in the instant case, Darch provided multiple position statements to Region 13 on behalf of all Respondents related to this unfair labor practice charge. (GC Exs. 38, 40, 40(b); Tr. 186, 190, 347, 409-10, 422-23, 427, 432-33, 450, 488). It should be noted that even in the underlying Westbrock Board case, the NLRB determined "that proper service was not made on the [r]espondent and further that the [r]espondent did not have actual notice of the charges." Id. (emphasis added). As argued, supra., Respondents here had actual notice.

Additionally, the dissent in the underlying Board case in Westbrock should also be noted here because the Ninth Circuit court of Appeals overturned in the majority to which Member Dennis was dissenting: "after [r]espondent's attorney asked the General Counsel to mail him another copy of the charges 'so we might consider submitting a position,' the attorney provided a statement of position." 274 NLRB at 1010 fn3. Here, not only do the facts demonstrate that there was proper service vis-à-vis Darch, but there was also actual notice on each Respondent who

admitted knowledge of the charge. Indeed, such knowledge caused Respondents to formally hire Darch to not only represent them in bargaining, which he was already doing, but also in the defense of the instant charge.

Respondents' mischaracterization of the ALJ's application of Buckeye as "an alternative theory" and his recognition of pertinent findings in Buckeye as mere "dicta" is negligent as it implies that certain findings—those most relevant and supportive to the Charging Party's case were not necessary to support this decision. RCE at p. 29. In Buckeye, the Board applied the Ninth Circuit's reversal of the Board's decision in Westbrock (the case that the Respondents in this case would have this Board apply) and found that the service of the complaint was proper because it was served on the respondent's attorney, an agent of respondent, within the 10(b) period. 299 NLRB at 1053-54. Simply because no exceptions were taken to the finding of agency does not make the finding, and the Board's reliance upon the finding, dicta. Instead, the Board adopted the ALJ's finding as admitted and relied upon the finding in making its decision to find that service in Buckeye was proper. Had the Board wished to engage in dicta, it would have either noted that it would have found otherwise, but nevertheless accepted the judge's finding as there were no exceptions filed, or members could have individually filed concurring or dissenting opinions addressing the attorney's agency and ability to accept service. This did not happen, however. Therefore, the Board adopted the findings and reasoning on the question of the attorney in Buckeye to acceptance of service. As previously demonstrated, the facts and circumstances surrounding the agency of the attorney in Buckeye and his ability to accept service of a complaint as satisfying 10(b) are similar to the instant case and the Board should uphold the ALJ's determination that the surrounding circumstances here also satisfy 10(b), and deny Respondents' cross-exceptions related to the issue of service.

The dissent in Westbrock also notes two relevant Board cases which should be considered here since Respondents are so quick to cite Westbrock, a case that was overturned by the Ninth Circuit and its reversal relied upon in Buckeye—Pasco Packing Co., 115 NLRB 437 (1956) and Peterson Construction Co., Inc., 106 NLRB 850 (1953). In Pasco Packing Co., the Board determined that service of a complaint on a respondent's attorney was adequate for the purposes of the Board's rules and regulations. This determination was made in large part due to the following surrounding circumstances, many of which are present in the instant case:

we think it clear that [r]espondent had adequate notice . . . the record shows that [the] agent for Theo Hamilton, Respondent's attorney, accepted delivery of the registered envelope addressed to him. The record further shows that all of the Union's requests for bargaining made subsequent to its certification and prior to the institution of this proceeding were replied to and rejected by Theo Hamilton. In view of these facts and in view of the fact that Hamilton was Respondent's attorney of record in the representation proceedings out of which the unfair labor practices herein involved arose, and filed the exceptions in this case on behalf of [r]espondent, we find that [r]espondent was duly notified . . . when service of the complaint was made upon its attorney. . . .

115 NLRB at 438. Here, after Fred Schwartz, the Respondents' prior attorney who acted on behalf of the Respondents for all matters involving negotiations, was terminated, Respondents immediately replaced that role with Douglas Darch. (GC Exs. 38, 40, 40(b); Tr. 186, 190, 347, 409-10, 422-23, 427, 432-33, 450, 488). From that point forward, Darch acted as the representative for all Respondents for all matters related to bargaining, from which the unfair labor practices herein arose. Darch communicated directly with the Union related to bargaining by writing letters on behalf of the Respondents, attempting to revoke/withdraw prior offers/acceptances on behalf of Respondents through written communications, and sending the letter on December 13, 2011, that officially in writing served as Respondents' rejection to execute the collective bargaining agreement between the parties, which was the direct cause for the filing of the instant unfair labor practice charge claiming an unlawful failure to execute the contract. *Id.* In view of the facts herein,

the Board should find that "Respondent[s] had adequate notice of the proceedings against it and was fully apprised of the allegations of the complaint" and "Respondent[s] w[ere] duly notified of the allegations of the complaint when service of the complaint was made upon its attorney." *Id.* in other words, service was proper under Section 10(b).

Similarly, in *Person Construction Co.*, the Board noted the following circumstances, strikingly similar to the instant case, when finding service had been perfected:

It is clear from these facts . . . that the Respondent had notice of the charge within the prescribed period. . . . the Respondent makes no contention that it was in any way misled or otherwise prejudiced by the proceedings relative to the original charge. Its position would thus appear to be that actual notice was not to be equated to legal notice and that it was entitled to the latter. We cannot subscribe to the Respondent's views. Where, as here, the error is one of misnomer and the proper Respondent has actual notice of the charge and of the obvious misnomer, to hold that the statutory requirements of service are not met is to project legalism to an unwarranted length.

106 NLRB at 851 (emphasis added). In the instant case, it is equally clear, and Respondents did not deny during testimony, that they had notice of the charge within the 10(b) period. Likewise, also in the instant case, in its voluminous briefing, Respondents have made "no contention that it was in any way mislead or otherwise prejudiced by the proceedings relative to the original charge." Instead, despite admitting actual notice of the charge, Respondents blindly argue that, like the respondent in *Peterson Construction*, it is "entitled" to legal notice instead of the actual notice which the Record fully supports. As the Board decided in *Peterson Construction*, the Board should, likewise, find in the instant case that "the charge was timely filed and service was made upon Respondent[s] within the meaning of Section 10(b) of the Act," and deny Respondents' cross-exceptions on the issue. *Id*. 26

D. The ALJ Correctly Rejected Admission of Exhibits 15 and 33. (Cross-Exceptions 20, 23).

Respondents arguments related to policy considerations outweighing the ALJ's "actual notice" standard, which is well-grounded in settled Board law, is far-reaching and extraordinarily hypothetical and deserves little, if any, attention.

Respondents devote one footnote, each, to their cross-exceptions related to the ALJ's denial of the admission of Respondents' exhibit fifteen and exhibit 33 (after the Record had closed) into the official Record. RCE at p. 16, fn. 6, 29 fn. 9. First, the ALJ properly denied admission of the exhibit fifteen, a documents related to an unrelated Illinois state agency and wholly unrelated to the instant case and generated well after the investigation of the ULP here, and the two agencies did not engage in any sort of collaborative investigation. Furthermore, the Illinois Department of Labor has its own set of rules and regulations that may or may not coincide with the National Labor Relations Board. The exhibit was not even of marginal relevance, and the ALJ properly denied its admission into the Record, and Respondents fail to cite to case law otherwise. Second, the ALJ properly denied the Respondents' attempt to alter the Record months after the protracted hearing had concluded. Respondents had ample opportunity to submit any and all relevant exhibits into the Record at the hearing, and attempting to do so outside the procedures of a hearing clearly deny the Union and Counsel for General Counsel the opportunity and right to engage in voir dire and cross examination. Again, the Respondents fail to cite any case law demonstrating otehrwise. Accordingly, both cross-exceptions should be denied.

III. RESPONDENTS' CROSS-EXCEPTIONS TO THE ALJ'S CONCLUSIONS OF LAW AND FINDINGS OF FACT ARE WITHOUT MERIT.

A. Respondents' Cross-Exceptions Related To Coordinated Bargaining Are Immaterial And, Nevertheless, Contrary To Record Evidence And Law. (Cross-Exceptions 2-4)

As a threshold observation, whether the instant case involved coordinated bargaining or multiemployer bargaining is not material to the matters upon which Respondents have excepted or the application of Board law (e.g., *United Electrical*). As properly noted by the ALJ, "I do not find the fact that this case involved coordinated bargaining (instead of multiemployer bargaining,

as was the circumstances in *United Electrical*) to be material regarding service of the ULP charge." ALJD at p. 21, fn. 21. As discussed, *supra*, in this brief, the ALJ's determination related to *United Electrical* is correct.²⁷ Furthermore, Respondents' Cross-Exceptions on this issue is simply not material and, as noted, it was part of the complaint that the parties were engaged in coordinated bargaining. Therefore, to make exceptions to findings that are not material to conclusions of law is yet another example of the Respondents' efforts to confuse an otherwise very simple case.

Respondents except to the ALJ's finding that the Chicago Parking Association negotiates collective bargaining agreements on behalf of companies who opt to participate in coordinated bargaining. (Exception 2). There is no question here that all named Respondents were named in the charge, named in the Complaint, and-admittedly-participated in contract negotiations with the Union in a collective effort. Accordingly, to except to the aforereferenced finding of fact serves only as an attempt to confuse the Record. Likewise, any alleged right of individual Respondents to reject or accept agreements (Exception 2), and the Union's alleged knowledge of this alleged right (Exception 3) are equally unimportant to the instant matter. The ALJ correctly found, as discussed elsewhere in this brief, that Schwartz was the agent for purposes of collective bargaining (until he was fired and Darch assumed that role) for each and every Respondent, individually and as a collective. When he spoke, he spoke on behalf of Respondents. If Schwartz communicated to the Union that there was agreement, then the Union had every right to interpret that communication as each and every Respondent was in agreement. Schwartz communicated the bargaining effort of Respondents to the Union that there was agreement. Accordingly, Respondents' Cross-Exceptions on this issue are irrelevant.

²⁷ It should be noted, also, that Respondents failed to address *United Electrical* in its brief to the ALJ. ALJD at p. 21, fn 37.

Additionally, Sixth Circuit case law relied upon by Respondents in their "coordinated bargaining" argument is not supportive of their position. Don Lee Distributor, Inc. v. NLRB, 145 F.3d 834 (6th Cir. 1998), upon which the Respondents rely, involved neither lawful coordinated bargaining nor multiemployer bargaining. Instead, it involved unlawful multiemployer bargaining. In looking at the facts of Don Lee, instead of out of context black letter law, the Respondents in this case have many similarities with the respondents in Don Lee who were found to be engaged in unlawful multiemployer bargaining. For example, in in Don Lee, respondents retained Fred Long, an outside "chief executive of a labor relations firm," to collectively represent them during bargaining with the Union, and respondents in that case "share[d] costs and expenses of Fred R. Long and his associates who . . . represent[ed respondents] bargaining efforts with the [u]nion." 145 F.3d at 837, 838. Similarly, in the instant case, the Respondents all admit that they retained Fred Schwartz to represent their collected efforts in bargaining efforts with the Union and that they shared his expense by paying pooled "dues" to the Chicago Parking Association for that representation. Tr. 722. Additionally, during the first day of bargaining in Don Lee, Fred Long "presented six identical proposals, one for each" respondent in that case. 145 F.3d at 839. Likewise, here, Fred Schwartz went beyond Fred Long in Don Lee and simply presented one proposal on behalf of all Respondents throughout bargaining. Tr. 120; GC Ex. 12. communications between Fred Long and the union in Don Lee, he often talked of respondents in that case as a collective, "... we are coming close to having everything we need to refine our first proposal next week . . . We will have our position on this issue refined soon . . . Our economic package . . ." 145 F.3d at 839 (emphasis in original). Likewise, in the instant case, when communicating to the Union on behalf of Respondents, Fred Schwartz often used the collective pronoun "we": "we are in accord" (Tr. 138; GC Ex. 15) and "we are fine" (GC Ex. 25-(a)-

(b))(emphasis added in both). Finally, as recognized by the Court in *Don Lee*, "[p]erhaps most tellingly, no [respondent] ever offered a contract proposal different from that offered by every other Distributor; even when the [u]nion made a proposal addressing an issue unique to a particular Distributor, an identical counterproposal was always forthcoming from all six Distributors." 145 F.3d at 843. Similarly, in the instant case, no Respondent ever offered a contract proposal different from that offered by every other Respondent, from that offered collectively on their behalf by Fred Schwartz. Accordingly, by relying upon *Don Lee* in support of its "coordinated bargaining" red herring argument, Respondents have inadvertently disclosed that while the Complaint in this case alleges "coordinated bargaining," what they were in fact engaged in was unlawful multiemployer bargaining.

Finally, Respondents blind extraction of black letter law in *Don Lee* without application of the actual facts in that case or this case still does not support its immaterial argument. The Court in *Don Lee* notes that "coordinated bargaining [is] a practice whereby parties share information and coordinate efforts but ultimately <u>retain</u> the authority to negotiate contract terms individually." 145 F.3d at 843 (emphasis added). While the Respondents may have "retained" authority to negotiate separate individual contracts, the admitted Record evidence demonstrates that not one Respondent exercised that right. Instead, they collectively allowed Fred Schwartz to bargain on their collective and individual behalves—that is, until Doug Darch stepped into the shoes of Fred Schwartz, at which time Darch took that role.

B. Fred Schwartz Was The CPA's Bargaining Representative With The Authority To Bind Respondents. (Cross-Exception 5)

Respondents' Cross-Exception to the ALJ's findings related to Schwartz's authority to bind Respondents is largely based upon credibility findings and should, therefore, be rejected by the Board. The ALJ found as follows: "Some of <u>Respondents' witnesses testified</u> that they

retained the right to approve or disapprove any agreements . . . <u>I do not find, however, that</u> Respondents notified the Union that Schwartz' authority to negotiate was limited, . . . <u>I do not credit that testimony</u> . . ." ALJD at p. 3, fn3 (emphasis added)(transcript citations omitted). The Board should not disturb the ALJ's findings related to Respondents' cross exception five because they were based upon the lack of credibility of Respondents' witnesses. The Board has repeatedly stated that "the Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Babi I*, 194 LRRM 1344 (NLRB, 9/26/12), *citing Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951).

Should the Board entertain Respondents' cross-exception five further, Respondents' defense that the they were engaging in "coordinated bargaining" and therefore not bound by the master agreement is in direct opposition to recent Board law that is notably similar to the facts and circumstances here. ²⁸ The Board in applying longstanding case law to coordinated bargaining that an agent assigned to negotiate a collective-bargaining agreement is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary." A.W. Farrell & Son, Inc. et.al., 359 NLRB No. 154,8 (2013); see also University of Bridgeport, 229 NLRB 1074 (1977). Such authority can only be limited by "giving clear and timely notice to the other parties that any tentative agreement is contingent upon subsequent approval or ratification." Id.:; Teamsters Local 771, 357 NLRB No. 173, slip op. at 5 (union agent deemed to have full authority to conclude agreement absent clear and timely notice of a limitation). In order for the notice to be timely, it must be "disclosed to the other party [i.e. the union] before an agreement is reached." Id.

²⁸ Likewise, Respondents are also bound by Schwartz's offers.

In A.W. Farell & Son, negotiations for a collective bargaining agreement were conducted with the union and four roofing contractors who bargained jointly for "convenience of all concerned," and the group did not constitute a multiemployer bargaining group. Id. at 3. Similar to the instant case, the intent of the roofing contractors was to sign five separate contracts that were "essentially identical." Id. The five roofing contractors were represented by McKellar who served as a spokesperson and chief negotiator and Landrum who represented the named Respondent. A. W. Farrell & Son, Inc., et. al., 359 NLRB No. 154 (2013). Landrum (like Prussian and Buscek) received copies of the communications and letters exchanged between McKellar and the union. Landrum or McKellar never stated during bargaining that they "lacked authority to bind the Respondent to the agreement." Like Schwartz, McKellar presented the last best and final offer to the union on July 29 by email. Id. at 3; GC Ex. 13-17, 21-26, 27, 29, 31. The union subsequently accepted the offer and ratified the agreement. Then on August 4, the respondent representative Landrum emailed McKellar stating that he did not have authority to bind the Respondent and therefore there was no agreement. A.W. Farrell & Son, 359 NLRB No. 154, 3 (2013). The Board rejected this defense stating that "by designating Landrum as it bargaining representative for the ...negotiations the Respondent clothed him with apparent authority to bind the Respondent to an agreement;" McKellar, undisputedly similarly was "clothed" with this authority to bind the roofing companies when McKellar's offer was accepted by the Union. Id. at 8. Respondent's further argument that the past bargaining history demonstrating that Landrum's owner Farrell actually signed the agreements put the union on notice that Landrum/McKellar did not have authority to enter into agreement was dismissed by the Board. Id. In response, the Board observed that Farrell's actions in signing the prior agreements "might have put the Union on notice that Farrell would be the person actually signing the agreements, [but those actions] would not have made it clear to the Union that anyone whom Farrell...sent to represent the Respondent at the bargaining table lacked authority to enter into an agreement." *Id.* at 13. Based on the above, the Board found that respondent violated 8(a) (5) and (1) of the Act by failing and refusing to execute and implement the reached agreement.

Applying the above-cited case law to the instant case, it is clear that Schwartz had apparent authority to accept and reach agreement with the Union on October 28, 2011 when he, as the representative for the CPA, announced his "accord" and that "we are fine" with the Union's final offer. GC Ex. 25-(a)-(b); Tr. 334. As was the case in A.W. Farrell & Sons, here too the parties engaged in coordinated bargaining and identified a sole spokesperson and representative for the purposes of bargaining a CBA. GC Ex. 1(c), 1(o)-(s). Also similar to A.W. Farrell & Sons, none of the CPA members or Schwartz himself mentioned that Schwartz lacked authority to make offers, accept offers, or enter into agreements or that the agreement he entered into as representative for the CPA would ultimately have to be approved by each individual company. Here too, the Respondents' bargaining history demonstrates that Schwartz himself never signed the agreement themselves, but that each individual owner signed the agreements. Tr. 46,297. This case is nearly identical to the A.W. Farell & Son, and its ruling is thus equally applicable here. Based on the above facts, it is clear that regardless of the artificial label the Respondents placed on what they were doing at the bargaining table (coordinated bargaining or otherwise), Schwartz had apparent authority to enter into the agreement with the Union on October 28, 2011, and any defense by Respondents that he did not is wholly inaccurate and in direct opposition to current Board law.

Even in situations where there is some sort of limitation or condition on the apparent authority of the negotiator to enter into a binding agreement with the Union, which did not exist

in the instant case, the Board has recognized that the same individual may, nevertheless, "have the apparent authority, however, to convey its satisfaction." Ben Franklin, 278 NLRB at 986; citing Walnut Hill Convalescent Center, 260 NLRB 258 (1982). As the Board stated, "for reasons fully set forth in the judge's decision, we find that Hart [the Respondent's president] had the apparent authority to convey the Respondent's final and binding approval of the . . . contract offer which the Union subsequently accepted." Id., citing Walnut Hill, supra; Niagara Therapy Mfg. Corp., 237 NLRB 1, 4 (1978).

In the instant case, not only did Fred Schwartz have the authority to bind the members of the Chicago Parking Association, but he clearly had the apparent authority to make comprehensive, unconditional final contracts offers. At all times during the 2006 and 2011 contract negotiations with the Chicago Parking Association, Fred Schwartz was the CPA lead negotiator and communicated all offers, proposals and acceptances (tentative or otherwise) to the Union on behalf of the CPA. Tr. 462. On behalf of the CPA, Schwartz communicated directly to the Union related to companies bound by the CPA negotiations (Tr. 106, 108, 295; GC Ex. 8-9; GC Ex. 10A-B.), presented proposals at the bargaining table on behalf of the CPA (Tr. 120; GC Ex. 12), presented verbal counter proposals on behalf of the CPA (Tr. 400), and presented repeated offers and counter-offers in writing to the Union during these negotiations (ALJD at p. 12; GC Ex. 13, 15, 21, 22, 25, 27). Accordingly, Schwartz not only had actual and apparent authority to offer and accept proposals on behalf of the Respondents, but he also—at a minimum—had the actual and apparent authority to "to convey [their] satisfaction" according to *Ben Franklin*. 278 NLRB at 986.

Furthermore, as also aptly recognized by the Board in Ben Franklin, "[t]o conclude otherwise would effectively mean that an undisputed negotiator for the Respondent had made a

comprehensive, unconditional final contract offer in bad faith, without any intention to be bound thereby." *Id.* Only one person made "comprehensive, unconditional final contract offers" on behalf of Respondents in the instant case—Fred Schwartz. If he did not, then Respondents apparently admit bad faith bargaining with an agent who had no authority to make such offers with any intention to be bound. Even more telling in this case is the fact that Respondents attempt, in their defense, to rely upon the conduct of Schwartz on November 2, 2011 and November 8, 2011 when he attempted to untimely withdraw offers (and/or revoke acceptances) on behalf of Respondents. If Schwartz did not have the authority to convey their satisfaction of an offer and thereby create a binding contract on Respondents prior to October 28, 2011, there is no Record evidence demonstrating why or how he was suddenly cloaked with such authority after that date to convey revocations and/or withdrawals of equally powerful (and sometimes binding when properly executed) legal meaning, consequence, and liability. Accordingly, Schwartz had the clear authority to enter into a binding agreement on behalf of all Respondents.²⁹

C. The ALJ Correctly Concluded That The Respondent's "Scrivener's Error" Theory Is Without Merit. (Cross-Exception 22).

The ALJ properly "reject[ed] Respondents' arguments that the parties reached an enforceable agreement on October 13-14 that included Respondents' version of the wage scales, and that the

Respondents' concluding argument in their Cross-Exceptions is a newly crafted argument that while Schwartz was nevertheless an "agent" of the Respondents, he was allegedly a "disloyal agent" and "wayward agent" of three of the five Respondents. RCE at pp. 47-49. Assuming arguendo that Schwartz was "wayward agent" of ABM, Laz, and Imperial, then the reverse of Respondents' argument is that he was a non-wayward agent—i.e., an agent—of Standard and Interpark, which is an astonishing admission for all five Respondents to collectively take in this matter. Case law cited by Respondents in support of their contradictory position on this argument are not supportive. First, not one Board case is cited. Second, the various appellate circuit cases that are cited state that the wayward attorney must have "cease[d] altogether to serve the interests of his client" and to act, instead "solely for the agent's own purposes." RCE at pp. 47-48. There is no Record evidence that Schwartz ever engaged in any conduct "solely for [his] own purposes." Finally, it is again a contradictory position for Respondents to collectively take. If Schwartz was allegedly acting in a manner "completely adverse" to ABM, Imperial, and LAZ's interests, only, then he must have been acting—as an agent—in the interest of Standard Parking and Interparking. Accordingly, it appears that Respondents are collectively admitting at the conclusion of their Cross-Exceptions that Schwartz bound, at a minimum, Respondent Standard Parking and Respondent Interparking during his October 25-28, 2011 negotiations with the Union and are, therefore, bound to sign that agreement.

written contract should be reformed to correct a scrivener's error . . ." ALJD at p. 24, fn40. Respondents' argument that the never proposed third tier that the CPA now seeks inclusion of, was missing from the agreed upon contract due to scrivener's error is entirely misplaced and inapplicable to the situation at bar. This argument should be seen as nothing more than a last effort by the Respondents to avoid paying employees the agreed upon increases. In fact, a scrivener's error is defined as:

a synonym for clerical error," [which is further defined as an error], "resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and nor from judicial reasoning or determination. Examples of clerical, or scrivener's error include omitting an appendix from a document; typing an incorrect number; mistranscribing a word; and failing to log a call.

US v. Gibson, 356 F.3d 761 (7th Cir. 2003) citing to Black's Law Dictionary 563 (7th ed. 1999). Yet another clear example of scrivener's error occurred in Washington Fruit and Produce Co., 343 NLRB 1215 (NLRB 2004), where a witness missed a "scrivener's error" in a Spanish translation, reading the word "no" instead of "nos." Id. 1265-1266. The "scrivener's error" identified by General Counsel referred to the missing "s." Id. If it was not already abundantly clear what scrivener's error actually is, the Board again provided another clear example in Cherry Hill Convalescent, 309 NLRB 518 (NLRB 1992). In Cherry Hill, the union was (as a result of scrivener's error) described as a labor organization "within the meaning of Section 2(2), (6) and (7) of the Act." Id. at 519. The Board actually discovered that those sections of the Act do not define "labor organization," however, section 2(5) of the Act did. Id. In describing what had occurred, the Board stated, "since it appears that this was a repeated scrivener's error and led to no confusion or misapprehension at the hearing, or thereafter, [the Board] ignore[d] the pleading and ma[de] the above finding." Id.

By comparing the above examples to the case at bar, it is clear that what occurred here was not a result of "scrivener's error." Here, we are not dealing with a missing letter, incorrect reference, minor mistake or inadvertence in drafting the agreed upon contract as was the case in Washington Apple, Cherry Hill and Gibson. Id. In fact, the final agreement and multiple drafts leading up to it all included the same wage provisions in writing for the Respondent's to see, comment and respond to fourteen times. At no point was the inclusion of another mystery third tier with a cutoff date from November 1, 2006-November 1, 2011 ever proposed, discussed, or incorporated into any of the drafts or final agreement; therefore, its non-inclusion now is not a mistake of scrivener's error, but a result of purposeful drafting of the actual agreement reached by the parties demonstrating "judicial reasoning [and] determination."

CONCLUSION AND REMEDIES

For all of the aforementioned reasons, Charging Party respectfully requests that the Board deny each and every cross-exception filed by Respondents in this matter and sustain Charging Party's and Counsel for the General Counsel's exceptions previously filed. Accordingly, the Charging Party respectfully request that the Complaint not be dismissed and, instead, upheld in its entirety, and that the remedies sought in the Union's and Counsel for General Counsel's Exceptions to the ALJ's Decision and Recommended Order filed be duly ordered.

Respectfully submitted,

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Filed: January 34, 2014 (filed electronically)

CERTIFICATE OF SERVICE

The undersigned attorney, Jayna Brown, hereby certifies under penalty of perjury under the laws of the State of Illinois that on January 31, 2014, she caused to be served upon the person(s) listed below in the manner shown Charging Party Teamsters Local 727's Response In Opposition To Respondents' Cross-Exceptions To The Decision of the Administrative Law Judge And Brief In Support Thereof, was served on the following parties via the method(s) indicated:

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